Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
2010 Quadrennial Regulatory Review - Review	)	MB Docket No. 09-182
Of the Commission's Broadcast Ownership	)	
Rules and Other Rules Adopted Pursuant to	)	
Section 202 of the Telecommunications Act of	)	
1996	)	

To: Office of the Secretary
Attention: Chief, Media Bureau

REPLY COMMENTS OF GRAY TELEVISION, INC.

Gray Television, Inc. ("Gray"), by its attorneys, submits this Reply to respond to the comments filed by the American Cable Association ("ACA") and Time Warner Cable, Inc. ("Time Warner") in the above-referenced proceeding.

In their comments, ACA and Time Warner advance a number of arguments relating to retransmission consent agreements. In significant part, the assertions contained in these comments echo the arguments in their comments submitted in response to the Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent, MB Docket No. 10-71 ("Retransmission Petition"), to which Gray, the National Association of Broadcasters, and many other parties have already responded. Gray submits that ACA's and Time Warner's comments, which deal exclusively with issues that allegedly arise in retransmission consent negotiations, are not properly before the Commission in this proceeding but rather should be considered in connection with the Retransmission Petition. However, to ensure that the record will be complete in this proceeding, Gray appends hereto its Comments and Reply Comments addressing the Retransmission Petition.[1]

In addition, Gray reaffirms its comments submitted in response to the Commission's May 25, 2010 Notice of Inquiry in the FCC's 2010 Quadrennial Review[2] that elimination, or substantial relaxation, of the local television ownership duopoly rules and continued regulatory restraint in the agency's treatment of shared services, management and joint sales agreements will best serve the public interest. The record before the Commission affirms that television stations require regulatory flexibility to adapt and survive in today's fast-changing media marketplace and supports a relaxation of the local ownership rules.

Although the retransmission issues raised in the ACA and Time Warner comments are dealt with extensively in Gray's Comments and Reply Comments in MB Docket No. 10-71, Gray believes that two specific issues raised by ACA and Time Warner require a direct response. First, Time Warner contends that dual affiliation "undermines the Commission's interests in diversity and localism" and brings "what would have been two or more major voices under the control of a single entity."[3] Gray strongly disputes that broadcasting more than one Top-4 network service in a market, as Gray does in several markets in full compliance with the Commission's rules, harms viewers or competition. In fact, in every market where Gray holds a dual affiliation, it is because there are not a sufficient number of full power television stations in the market to

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[1] See Exhibit 1.

[2] 2010 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 2020 of the Telecomms. Act of 1996*, Notice of Inquiry, FCC 10-92, MB Docket No. 09-182 (rel. May 25, 2010) ("*2010 Quadrennial Review NOI*" or "*NOI*").

[3] Time Warner Comments at 16.

broadcast each of the Top 4 networks.[4] Gray currently broadcasts a total of 39 secondary program streams, including several Top-4 affiliated network services. Gray provides these program streams to viewers over-the-air, for free. Gray's willingness to invest in the multicast capability of its digital spectrum has expanded significantly the free programming options for viewers in these markets.[5]

ACA similarly alleges that "[c]ombined ownership or control of top 4 local affiliates decreases … competition because it permits broadcasters to secure higher retransmission consent fees."[6] In Gray's experience, this is simply not true. As noted in Gray's Reply Comments to the Retransmission Petition, Gray compared the terms of its retransmission consent agreements in markets where it broadcasts more than one Top-4 affiliate network service with agreements in markets were it only broadcasts one major network.[7] On average, Gray receives no more consideration for retransmission consent per network service in those markets where Gray multicast a Top-4 network than in those markets where it broadcast a single network. In fact, multicast stations, even those carrying Top-4 network programming, frequently receive *less* consideration per network service than many of Gray's single Top-4 affiliated stations.[8]

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[4] Therefore, without the benefits of multicasting, viewers in these markets would not be able to receive these network affiliated program streams over-the-air. In three of the markets where Gray broadcasts more than one Top-4 network signal, there are only two-full power commercial stations (Sherman, TX-Ada, OK, Bowling Green, KY and Charlottesville, VA) . In two other markets, Gray owns the only full-power commercial television station (Parkersburg, WV and Harrisonburg, VA).

[5] *See* Gray Reply Comments to Retransmission Petition at 2.

[6] ACA Comments at 7.

[7] *See* Gray Reply Comments to Retransmission Petition at 3.

[8] *Id.*

Second, in its comments Time Warner falsely suggests that Gray and Young are colluding through their management agreement to "band[] together when negotiating retransmission consent." While Gray and Young have a management agreement in place, the public interest benefits of which are discussed extensively in Gray's Comments,[9] Gray has not negotiated the terms of a single retransmission agreement for a Young station. Given the bargaining power that Time Warner -- with more than 14.6 million subscribers nationwide and substantial control of MVPD distribution in individual markets – can wield against individual broadcast stations with a fraction of Time Warner's reach and financial resources, Gray believes that Time Warner's concerns ring exceedingly hollow.

Respectfully submitted,

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Dated: July 26, 2010

[9] See Gray Comments at 13-15.

EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent	)	MB Docket No. 10-71
	)	
	)	

COMMENTS OF GRAY TELEVISION, INC.

Gray Television, Inc. ("Gray"), by its attorneys, submits these comments in response to the Petition for Rulemaking referenced above to modify the rules governing retransmission consent. The petition should be rejected.

Gray believes—and its experience demonstrates—that the current marketplace-oriented regime governing retransmission consent benefits the viewing public by incenting broadcasters and their multichannel video programming distributor ("MVPD") partners to enter into mutually beneficial agreements for the distribution of broadcast signals. The rule changes proposed by the petitioners—in particular, granting MPVDs the unilateral right to compel "interim" carriage and imposing compulsory arbitration even absent a finding of bad faith by the broadcaster—would certainly enhance the economic well-being of MVPDs, but would impose onerous, unnecessary, and unlawful burdens on broadcasters. In the end, consumers would suffer.

Gray supports the comments filed by the National Association of Broadcasters ("NAB"), which convincingly demonstrate that the petitioners' proposed revisions to the retransmission consent rules lack any basis in history, law, or basic economics. Gray offers these separate comments to detail its experiences in negotiating carriage agreements with MVPDs and to show how the current regime functions properly, just as Congress intended.

*   *   *

Gray owns 36 television stations serving 30 medium- to small-sized markets throughout the country, ranging from WVLT(TV), Knoxville, Tennessee in the nation's 59th largest Designated Market Area ("DMA"), to WTAP(TV), Parkersburg, West Virginia in the nation's 18th smallest DMA. Gray operates stations in eight state capitals and 17 major university towns.

All of Gray's facilities are affiliated with a major television network.[1] With its state-of-the-art digital facilities, Gray also multicasts 39 secondary program streams, including one affiliated with ABC, four affiliated with FOX, seven affiliated with CW, 18 affiliated with MyNetworkTV, two affiliated with Universal Sports Network, and seven local news/weather channels. Combined, Gray's stations reach over six percent of all U.S. television households.

Gray's stations have enjoyed remarkable success by providing truly local service, with an emphasis on local news strongly desired by viewers. Thus, Gray's stations are ranked number one in local news in 23 of 30 DMAs (and number two in local news in six additional markets), and number one overall in 21 DMAs. With their dedication to local programming and service, Gray's stations have earned more than 500 national, state, and local news and community services awards since 2003, including multiple Edward R. Murrow awards, regional Emmy awards, "Station of the Year" awards, "Most Outstanding News Operations" awards, and "Best Documentary" awards.

Like all broadcasters, Gray relies on MVPDs to deliver the stations' signals to the vast majority of its viewers. And although Gray's stations are preeminent in their respective markets, Gray often must negotiate for carriage of its stations with substantially larger and better financed media conglomerates. Gray estimates that only ten entities control more than seventy-five

[1] Gray's stations are affiliated with CBS (17), NBC (10), ABC (8), and FOX (1).

percent of all MVPD homes served by Gray's stations. Moreover, MPVDs with smaller national reach control substantial portions of many of the DMAs served by Gray's stations, giving those MVPDs substantial bargaining leverage over local television stations in retransmission consent negotiations. For example, one of the petitioners, Mediacom, controls approximately three-quarters of all cable subscribers that receive the signal of Gray's WSWG(TV), Albany, Georgia station.[2]

Gray has not encountered any of the rampant brinksmanship, impasses, or consumer harms that Petitioners allege result from retransmission consent negotiations. Gray's experience is entirely to the contrary. Since 2008, Gray has successfully negotiated retransmission consent agreements with 251 MVPDs, including most of the Petitioners, *without a single subscriber losing access to a single minute of programming from a Gray station*. Gray sees no reason to change rules that clearly promote effective deal-making by broadcast stations and MVPDs.

In light of the positive experience that has benefited Gray itself, MVPDs, and their subscribers, Gray believes the circumstances that prompted Congress to adopt a market-based approach to retransmission consent remain as valid today as they were in 1992. Thus, nearly twenty years ago, Congress concluded that the ability of MVPDs to retransmit the signals of broadcast stations without consent created a "distortion in the marketplace" whereby "broadcasters in effect subsidize the establishment of their chief competitors."[3] Congress also found that, just as cable networks are compensated for the programming they provide to MVPDs, broadcasters should be compensated for the services they originate, which are profitably resold

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2 Cable operators control, in the aggregate, just under 60% of all multichannel homes in the Albany, Georgia market. *See* http://www.tvb.org/rcentral/markettrack/Cable_and_ADS_Penetration_by_DMA.asp.

3 Cable Television Consumer Protection and Competition Act of 1992, S. Rep. No. 102-92, at 35 (1991).

by MVPDs.[4] Congress wisely left to the marketplace the determination of what the compensation should be, if any at all, in a particular transaction. Thus, as Congress stated at the time, the intent of the statute was to "establish" a market for the retransmission of broadcast signals, and not to "dictate the outcome of the ensuing marketplace negotiations."[5]

In implementing the statutory scheme, the FCC has properly limited its oversight to the *process* by which retransmission consent is negotiated. In recognition of "unambiguous" provisions of the statute that preclude retransmission of a broadcast signal without the station's "express consent," the Commission has repeatedly refused to interfere with the marketplace either by authorizing an MVPD to carry a station's signal without the broadcaster's consent or by imposing its own substantive terms for carriage. To the extent parties to a negotiation disagree on price (or any other term), the Commission has wisely concluded that the dispute is most efficiently resolved by the broadcaster and the MVPD. Indeed, in the extremely few instances in which the FCC has adjudicated a complaint – none of which found the broadcaster to have violated any legal duty – the Commission has held that the back-and-forth negotiations between the parties were exactly what Congress intended to occur and that, at heart, the disagreements were about the value of retransmission consent.[6] And the marketplace, not a regulatory body, was the proper forum to determine price.

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4 *Id.*

5 *Id.* at 35-36.

6 *See EchoStar Satellite Corporation v. Young Broadcasting, Inc., et al.*, 16 FCC Rcd 15070 (Cable Bur. 2001); *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, 22 FCC Rcd 35 (Med. Bur. 2007). *See also ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645 (Med. Bur. 2009) (finding that Gray's WSWG-DT did not fail to negotiate in good faith with an out-of-market cable operator).

Contrary to petitioners' allegations, the FCC has concluded that as a general rule broadcasters and MVPDs "negotiate in the context of a level playing field," with both sides bargaining from positions of relative equality.[7] In fact, the FCC has consistently ruled that the regulatory burdens petitioners seek to impose on broadcasters here – compelled "interim carriage" and mandatory arbitration – are unwarranted, with the sole possible exception of negotiations involving a vertically-integrated MVPD and a major network broadcaster.[8] Absent that unique vertical combination, however, the Commission has found that the existing market-oriented rules governing process are adequate and appropriate to generate the public interest benefits Congress intended to derive from the retransmission consent regime.[9]

Petitioners complain that "substantial changes to the media landscape" render the current system dysfunctional, but Gray's experience is entirely to the contrary. Specifically, MVPDs continue to wield tremendous leverage in retransmission consent negotiations. As noted above, Gray often negotiates with cable operators that control access to a large majority of multichannel subscribers in an individual station's market. As the FCC recently found, cable operators are increasingly consolidating their control of local markets by engaging in system swaps to

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7 *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, at 24-25 (¶ 44) (Sept. 8, 2005).

8 *See General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 565 (¶ 203) (2004) ("*Hughes-News Corp. Order*").

9 Following News Corp.'s divestiture of its interest in DIRECTV, the FCC eliminated the arbitration conditions that had been imposed in the *Hughes-News Corp. Order* on the negotiation of retransmission consent for FOX Network's owned and operated stations. The FCC held that absent vertical integration, additional burdens like the ones proposed by petitioners here were unnecessary. *See General Motors Corporation, Hughes Electronics Corp., Transferors and The News Corporation, Limited, Transferee*, Memorandum Opinion and Order, FCC 09-50, MB Docket No. 03-124 (rel. June 15, 2009).

"cluster" systems in specific markets.[10] So, while competition among MVDPs may be on the rise generally, broadcasters still negotiate with entities that control the lion's share of local markets.

Nor have marketplace changes enabled Gray to extract any consideration that could remotely be considered unreasonable. Retransmission consent fees account for a small percentage of Gray's overall revenue.[11] Citing to large percentage increases allegedly demanded by broadcasters, the petitioners complain about "spiraling carriage fees."[12] But they omit a key fact. Until the past few years, the amount of cash paid by the vast majority of cable operators for retransmission consent, even for Gray's highly-rated stations, was *zero*. Obviously, *any* amount of money paid above *nothing* can be characterized as a substantial increase. But in Gray's view, the total amount of consideration paid by MVPDs relative to the value that they receive by reselling Gray's "must have" programming to subscribers remains extremely modest.

While retransmission consent fees remain low, and almost certainly well below the amounts MVPDs pay for comparably-rated cable network services, they are increasingly important to broadcasters' ability to deliver service that meets the needs of their communities. In Gray's case, retransmission fees have helped support the multi-million dollar capital investment needed to transition 36 television stations to digital operations. With these improved facilities, Gray also invested considerable sums to develop the dozens of multicast program

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10 *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 550 (2009).

11 Gray's retransmission consent fees contributed only 5.8% to overall revenue in 2009. Gray Television, Inc., Form 10-K, filed April 7, 2010, available at http://ccbn.10kwizard.com/xml/download.php?repo=tenk&ipage=6878630&format=PDF.

12 Petition at 26.

streams referenced above, including locally-originated news services.[13] Unfortunately, MVPDs have refused Gray's request for carriage of many of these secondary streams. This lack of carriage deprives Gray of valuable revenue streams to support the substantial costs incurred to provide these services to viewers, and limits multichannel subscribers' choice of programming. Of course, if Gray possessed the extraordinary power to impose the "take it or leave it" demands that petitioners allege broadcasters wield in retransmission consent negotiations, most if not all of Gray's secondary services would enjoy far greater distribution. Yet, not even Gray's number-one rated stations have the power unilaterally to dictate terms for retransmission consent.

Relying on a few isolated publicly-reported carriage disputes, the petitioners now seek to turn sound Congressional policy, which favors free market negotiations to determine the terms of private contracts, completely on its head. Thus, despite clear statutory language to the contrary, petitioners desire the right to retransmit broadcast broadcasters' signals without consent, without agreement on the terms of retransmission, and without any finding that the broadcaster has done anything wrong. Rather, under the proposals set forth by petitioners, an MVPD could retain carriage rights to broadcast signals simply by failing (or refusing) to renew a retransmission consent agreement. In addition to enabling one party effectively to extend for its own benefit the terms of an otherwise expired private contract, this outcome would destroy any incentive of the MVPD to negotiate. This is hardly a free-market outcome.

In addition, were the government to intrude on behalf of MVPDs by giving them the right effectively to modify the term of a contract, broadcasters would be deprived of their only remedy against an MVPD that refused to offer fair compensation for retransmission consent, that is, the

[13] For example, Gray's WHSV(TV), Harrisonburg, Virginia, in cooperation with Shenandoah University in Winchester, constructed a broadcast production facility from which it originates a newscast targeted to the local community. WHSV multicasts the Winchester news service, which is carried by some, but not all, MVPDs in the area.

right to withhold consent as provided by statute. By stripping broadcasters of this critical right, MVPDs would completely eliminate the risk of losing the ability to resell for their own profit the services they would then be taking without consent from broadcasters. Again, regulation would replace the business judgment of parties to a contract and coerce one side to accept terms that could not be achieved in a fair, free-market negotiation. This irrational result would deny broadcasters the opportunity to bargain for fair value for the services that MVPDs resell to subscribers. In turn, broadcasters would lose critical revenue – revenue that their chief competitors had effectively appropriated by regulation – that is needed to maintain and improve the over-the-air services they are obligated by law to provide to their communities of license.

The petitioners' dispute resolution mechanism fairs no better. A government-mandated arbitrator could not appropriately value the numerous, important non-cash terms that are part of the typical retransmission consent agreement, including signal quality, multicast carriage rights, channel and tier placement of services, and signal delivery. In Gray's experience, many of these non-cash terms can be just as important, and just as difficult to reach agreement on, as the basic "price" to be paid for retransmission consent. No entity other than Gray and the MVPD can decide which combination of rights and obligations best meets their individual needs in a particular negotiation. The government intervention proposed by the petitioners is therefore unnecessary and extremely unwise.

* * *

Petitioners' proposed rules should be seen for what they are—a way for MVPDs to promote their self-interest by using regulatory burdens to suppress the bargaining power of broadcasters and, ultimately, the value of their "must have" programming. Gray's experience demonstrates that the existing retransmission consent rules function appropriately and have enabled broadcasters and MVPDs to reach thousands of carriage deals without incident for the benefit of the viewing public. Accordingly, modification of the rules governing retransmission consent is unwarranted, and the Commission should reject the Petition for Rulemaking.

Respectfully submitted,

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May 18, 2010

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent	)	MB Docket No. 10-71
	)	
	)	

REPLY OF GRAY TELEVISION, INC.

Gray Television, Inc. ("Gray"), by its attorneys, submits this brief Reply to address the suggestion that cable systems need special "remedies" to negotiate retransmission consent agreements with television stations that control more than one program service affiliated with a "Top-4" broadcast network (*i.e.* ABC, CBS, FOX, and NBC) in the same market.[1]

The American Cable Association ("ACA") complains that broadcasters can "circumvent th[e] general prohibition" against common ownership of top-4 rated stations in a single market to the detriment of small cable operators (and ultimately their subscribers) by forcing them to pay higher prices for retransmission consent.[2] The ACA then lists 93 instances in which a single

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1 Comments submitted in this proceeding overwhelmingly rebut claims that multichannel video programming distributors ("MVPDs") need the intervention of the federal government to enable them to negotiate fair deals for programming they resell for substantial profit to subscribers. The record demonstrates that the existing market-oriented retransmission consent regime benefits the viewing public by incenting broadcasters and MVPDs to enter into mutually beneficial agreements for the distribution of broadcast signals.

2 *See* Comments of American Cable Association, MB Docket No. 10-71 (May 18, 2010), at 3, 9, 11.

entity allegedly owns or controls more than one Top-4 network affiliated service in the same market, five of which are provided by Gray.[3]

In Gray's experience, ACA's allegation is incorrect in two fundamental respects. First, broadcasting more than one Top-4 network service in a market, as Gray does in full compliance with the Commission's rules, provides enormous benefits to viewers, especially in the nation's smallest markets. As noted in its initial comments in this proceeding, Gray operates 36 mostly small-market television stations, which multicast a total of 39 secondary program streams, including several Top-4 affiliated network services. Through substantial investments in digital technology and programming, Gray has launched locally-based, highly-popular network services in areas where they did not previously exist in the same form. Critically, these new locally-originated Top-4 network services are now available to anyone with an over-the-air antenna, *for free*, in some of the nation's smallest television markets: Sherman, TX-Ada, OK (161st DMA), Harrisonburg, VA (178th DMA), Bowling Green, KY (182nd DMA), and Parkersburg, WV (194th DMA). In Charlottesville, VA (183rd DMA), Gray constructed from the ground up new lower power television stations to provide over-the-air services affiliated with the ABC and FOX television networks.[4] Of course, viewers do not have to pay cable operators a cent to view these desirable national networks.

Moreover, without multicasting, viewers in these markets would have no over-the-air option to receive programming from all major networks for the simple reason that not enough full-power stations exist to broadcast them. Only two full-power commercial stations are licensed to operate in three of the markets where Gray broadcasts more than one Top-4 network

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3 *Id.*, Appendix C.

4 These station's complement Gray's WCAV(TV) (CBS), Charlottesville, Virginia.

service (Sherman-Ada, Bowling Green, and Charlottesville), and in two markets, Gray owns the *only* licensed full-power commercial station (Harrisonburg, and Parkersburg).

Second, contrary to ACA's unsubstantiated rhetoric,[5] broadcasting more than one Big 4 network services in the same market does not enable Gray to "cream[]" small cable operators. Gray compared the terms of its retransmission consent agreements in markets where it broadcasts more than one Top-4 affiliated network service with agreements in markets where it broadcasts only one major network program. On average, Gray receives no more consideration for retransmission consent per network service in markets where Gray multicasts a Top-4 network than in markets where Gray operates a single Top-4 service. In many cases, stations that multicast Top-4 network programming receive substantially *less* consideration per network service than many of Gray's single Top-4 affiliated stations.

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[5] ACA at iii ("All available evidence suggests that joint control or ownership of multiple Big 4 affiliates in a single DMA results in significantly higher retransmission consent fees...."). Even ACA's economist cautions that the "available evidence" consists of "only one data point." *Id.*, Appendix B at 12.

In short, by multicasting additional Top-4 network services in small markets for free, over-the-air viewing, Gray provides substantial benefits to the public without any of the economic burdens alleged by the ACA.[6] Thus, the allegation that ownership of more than one Top-4 affiliated network service in a market is a "problem" requiring a "remedy" with respect to negotiating retransmission consent agreements should be rejected.

Respectfully submitted,

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6 On its face, the "remedy" proposed by ACA – compel a single broadcast licensee to "assign different teams" to negotiate each network program stream , then prohibit them from communicating with each other – appears as unworkable as it is unnecessary.